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IN THE
SUPREME COURT OF THE UNITED STATES

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

CLEVELAND B. WALTON,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the Fourth Circuit

BRIEF *AMICI CURIAE* OF AARP; NOSSCR; ET AL.; IN SUPPORT OF RESPONDENT

(Additional *Amici* continued on inside cover)

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National Association of Developmental Disabilities Councils (NADDC);
National Multiple Sclerosis Society;
Title II Community AIDS National Network (TIICANN),
United Cerebral Palsy Associations

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BRIEF *AMICI CURIAE* OF AARP; NOSSCR; ET AL.; IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*[1/]

This *amici curiae* brief is submitted on behalf of AARP, the National Organization of Social Security Claimants' Representatives (NOSSCR), the National Senior Citizens Law Center (NSCLC), the American Association of People with Disabilities, the American Council of the Blind (ACB), the

[1/] This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

American Occupational Therapy Association, The Arc of the United States, the Bazelon Center for Mental Health Law, the Brain Injury Association of America, the Disability Law Center (Boston, Massachusetts), the Epilepsy Foundation®, the Helen Keller National Center for Deaf-Blind Youths and Adults (HKNC), the National Association of Developmental Disabilities Councils (NADDC), the National Multiple Sclerosis Society, the Title II Community AIDS National Network (TIICANN) and the United Cerebral Palsy Associations. The statement of interest of *amici* is included in the appendix to this brief.

By written consent of the parties, *amici curiae* submit this brief in support of the Respondent.[2/]

SUMMARY OF THE ARGUMENT

Federal disability benefit programs provide a low level of income support for individuals whose severe disabilities have lasted or are expected to last twelve months. The programs include numerous deterrents to leaving work to claim benefits. While most people with disabilities want to work, many are unable to secure employment, due to both the severity of their disabilities and workplace discrimination.

Many applicants for federal disability programs do not receive a final favorable decision for over a year. While waiting for benefits, many applicants have no means of support and live in abject poverty. Due to their dire need for income, applicants may try unsuccessfully to return to work. People with disabling impairments should not be denied disability benefits for attempting to work when they have waited months for a decision on their applications for benefits and have no other means of survival.

The Commissioner's interpretation of the Social Security Act in this case punishes the person with an impairment of

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[2/] Letters of consent from both parties have been filed separately with the Clerk of the Court.

disabling severity which persists for at least twelve months, who attempts to return to work. The Commissioner's position is not only inconsistent with the plain meaning of the Act but also is contrary to the unanimous view of all five circuit courts of appeal which have considered the issue.

Individuals with disabilities who attempt to return to work are often unsuccessful in maintaining that employment. The Commissioner's interpretation of the Social Security Act would result in the denial of benefits if the application is decided during a brief period of an unsuccessful work attempt which started within 12 months, but would result in the approval of benefits if the application is decided by the agency after a brief work attempt has failed. This unreasonable and capricious result can be easily avoided by following the literal statutory definition of disability which does not require the applicant to cease working for twelve months.

The Commissioner's position in the instant case is also inconsistent with the rehabilitative goal of the Social Security Act and related legislation to provide incentives for individuals with disabilities to work. For example, the Ticket to Work legislation is replete with Congressional statements emphasizing the importance of encouraging people with disabilities to work and not penalizing them for their efforts to secure gainful employment.

ARGUMENT

I. DISABILITY BENEFITS BARELY LIFT MOST BENEFICIARIES OUT OF POVERTY AND ARE NOT A DISINCENTIVE TO WORK

The federal disability benefit programs provide a low level of income support for individuals with severe disabilities. These programs do not encourage people to leave work, but rather provide a minimal safety net of support for individuals whose disabilities impose limitations on their earnings capacity.

The Social Security Disability Insurance ("SSDI") benefit calculation is designed to provide a higher percentage of

earnings replacement for low earners than for higher earners. For example, a worker who had been earning $30,000 per year would receive SSDI benefits at approximately 43% of her earnings, while a worker who had been earning $76,000 per year would have an SSDI replacement rate of 28%. Despite the fact that at lower earnings levels benefits can amount to approximately half of prior earnings, this nevertheless often results in a standard of living below poverty.[3] The average monthly SSDI benefit in December 2000 was $786, just slightly higher than the poverty threshold of $747 per month for an individual.[4]

The program contains numerous deterrents to leaving work to claim benefits. SSDI covers only those workers with a record of fairly steady and recent work. The program imposes a five-month waiting period, during which no benefits may be received, regardless of the severity of the disability.[5] In addition to the five-month waiting period for benefits, there is a 24 month waiting period to obtain health care coverage

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[3] National Academy of Social Insurance (NASI), *Disability Income Policy in 2001 - Excerpts from Balancing Security and Opportunity*: The Challenge of Disability Income 45 (2001) http://www.nasi.org/publications2763/Publications_list.htm?cat=Reports.

[4] *Id.* Of course, without Social Security benefits, individuals with disabilities would be much poorer. *See* Social Security Administration, *Income of Disabled-Worker Beneficiaries* 22 (2001), http://www.ssa.gov/policy/programs/disability/di_chart.pdf. While this brief specifically addresses the SSDI program, the issues in this case could have an impact on other disabled beneficiaries who receive benefits under Tittle II of the Social Security Act, such as disabled adult children, *see* 42 U.S.C. § 402(d)(1) (2001), and disabled surviving spouses, *see* 42 U.S.C. § 402(e)(1) and (f)(1) (2001). These programs use a definition of disability similar to the SSDI program.

[5] 42 U.S.C. § 423(a)(1), (c)(2) (2001).

through Medicare. These waiting periods "provide incentives for persons to remain at work, if possible."[6]

The two most prevalent diagnoses leading to an award of SSDI benefits in 1999 were impairments of the musculoskeletal system (24%) and mental impairments (23%). Other major diagnoses that led to an award of SSDI benefits in 1999 were impairments of the circulatory system (12%) and neoplastic disorders (cancer) (11%).[7]

The Supplemental Security Income program ("SSI") also provides benefits to persons with disabilities. SSI is not based on the individual's work record, but instead is a means tested program, provided for those with no or low income and assets. In 2002, the maximum federal SSI benefit level will be $545, which is only about 70 percent of the official poverty threshold for an individual under age 65. In most states, SSI recipients are automatically entitled to health care coverage under the Medicaid program. Nevertheless, with benefit levels below the poverty line, most individuals would prefer reasonably remunerative employment.[8]

The number of individuals newly awarded disability benefits through the SSDI and SSI programs has been fairly steady since the end of the recession in the early 1990s. Death and shifting to retirement benefits at age 65 are the main reasons people stop receiving disability benefits. The proportion of recipients

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[6] NASI, *supra*. The 24 month waiting period for Medicare benefits does not apply to individuals with end stage renal disease or amyotrophic lateral sclerosis. 42 U.S.C. § 426-1(b) (2001); Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 115, 114 Stat. 2763 (2001).

[7] Social Security Advisory Board, *Disability Decision Making: Data and Materials* 43 (2001), http://www.ssab.gov/reports.html.

[8] NASI, *supra*, at 46.

who medically recover or return to work has always been relatively small.[9/]

II. MOST PEOPLE WITH DISABILITIES WANT TO WORK BUT HAVE GREAT DIFFICULTY FINDING JOBS

Most Americans with disabilities want to work but are not able to secure employment, *see* H. R. Rep. No. 106-220, at 5 (1999), due to both the severity of their disabilities and barriers to employment. A Harris Poll conducted in 2000 found that only 32% of people with disabilities of working age (18 to 64) worked full or part-time, compared to 81% of people without disabilities. The more severe the disability and the older the individual, the less likely that person is to be employed. The unemployment rate for people with disabilities has remained relatively constant over the past fourteen years. Among those not working, two out of three people with disabilities stated that they would prefer to work.[10/]

While people with disabilities who are able to work are better off financially than those who do not work at all, people with disabilities who are employed earn far less than the non-disabled population. Estimates of earnings of workers with disabilities indicate that they earn about forty percent less than those without disabilities. Even those persons with disabilities who work full time have a poverty rate three times that of full

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[9/] NASI, *supra*, at 35-38.

[10/] National Organization on Disability, *Employment Facts about People with Disabilities in the United States*, http://www.nod.org/cont/dsp_cont_item_view.cfm?viewType=search&contentId=14 (June 28, 2001) (citing National Organization on Disability and Louis Harris and Associates, 2000 *N.O.D./Harris Survey of Americans with Disabilities* (2000) (hereinafter N.O.D./Harris poll).

time workers without disabilities.[11/] Moreover, people with disabilities tend to have less education than persons without disabilities, further compounding their difficulty in securing employment.[12/]

Individuals with disabilities encounter "widespread discrimination" from employers who tend to underestimate their productivity and "overstate the limiting effects of impairments."[13/] More than one third of employed people with disabilities (36%) surveyed by the Harris Poll in 2000 reported that they had encountered discrimination in the workplace because of their disabilities, such as being refused a job due to their disabilities, being given less responsibility than co-workers, being paid less than other workers with similar skills in similar jobs, and being refused a job promotion.[14/]

The Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, passed in 1990, prohibits discrimination by employers against persons with disabilities, and requires employers to provide reasonable accommodations for employees with disabilities.[15/] While the ADA is helpful to some persons with disabilities, the ADA has neither eliminated

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[11/] *Id.*; Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. Ill. L. Rev. 889, 898, 911 (2000).

[12/] Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 Tex. L. Rev. 1003, 1012 (1998); Edward Yelin & Miriam Cisternas, *The Contemporary Labor Market and the Employment Prospects of Persons with Disabilities at 50* in Jerry L. Mashaw et al. eds., *Disability, Work and Cash Benefits* (1996).

[13/] Diller, *supra*, at 1012.

[14/] N.O.D./Harris poll, *supra*.

[15/] The employment discrimination provisions in Title I of the ADA are applicable to employers with 15 or more employees. 42 U.S.C. § 12111(5)(A) (2001).

discrimination nor obviated the "[s]evere levels of unemployment and poverty" that persons with disabilities experience.[16/]

Due to the difficulty persons with disabilities experience in securing employment, most people whose claims for disability benefits are denied remain out of the work force. Furthermore, studies of individuals who were terminated from disability benefits in the early 1980s and did not get reinstated found that many such persons remained out of work years later.[17/] These studies demonstrate "the magnitude of the barriers to work faced by" persons with disabilities.[18/]

In the instant case, the Commissioner argues that even though the Social Security Act does not require the applicant to be out of work for 12 months in order to qualify for benefits, the agency has chosen to deny benefits to applicants with severe disabilities who attempt to go back to work less than a year from their date of application but prior to a determination of disability. (Petitioner's Brief at 30-32.) With all the disincentives that exist for people with disabilities to attempt to work, there is no justification for the Commissioner to add another disincentive as she attempts to do here, which she acknowledges is not required by the text of the Act.

III. DESTITUTE APPLICANTS WITH DISABLING IMPAIRMENTS MAY TRY TO RETURN TO WORK IN ORDER TO SURVIVE BECAUSE OF LENGTHY DELAYS IN AWARDING BENEFITS

Many applicants wait numerous months, or even years, for a favorable decision on their applications for disability benefits. Lacking any means of support, some disabled applicants attempt to reenter the workforce in order to pay their bills and

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16/ Weber, *supra*, at 890-891.

17/ Diller, *supra*, at 1071.

18/ *Id.*

survive. However, due to their disabilities, many applicants who try to work are unsuccessful and become destitute as a result.

Claimants seeking either SSDI or SSI may proceed through a four step administrative process to obtain a final decision on their disability applications. Claims are considered first on an initial application. A claimant denied benefits may seek reconsideration. If denied again, a claimant may request a *de novo* hearing before an SSA administrative law judge (ALJ). If denied again, a claimant may request review of the hearing decision by SSA's Appeals Council as a prerequisite for seeking judicial review in federal district court. Additionally, the Appeals Council may perform "own motion" review of an ALJ decision which is favorable to a claimant. A claimant receiving a final administrative decision denying benefits may seek judicial review in the federal district court.[19/]

In FY 2000, an average wait for an ALJ decision on an SSDI claim was approximately 437 days from the initial date of application, or over one year and two months.[20/] In that year,

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19/ *See generally Sims v. Apfel*, 520 U.S. 103, 105 (2000); *Bowen v. City of New York*, 476 U.S. 467, 472 (1986); 42 U.S.C. § 405(g) (2001). The Social Security Administration is experimenting in some states with eliminating the reconsideration stage and also eliminating for some claimants the request for review to the Appeals Council. Modifications to the Disability Determination Procedures; Disability Claims Process Redesign Prototype, 64 Fed. Reg. 47218 (Aug. 30, 1999), 65 Fed. Reg. 36210 (June 7, 2000).

20/ In FY 2000, the average processing time from the date of application to the date of an initial decision on SSDI benefits was 104 days and for SSI benefits was 120 days. The average processing time for reconsideration of an unfavorable decision for SSDI was approximately 63 days. (The time for reconsideration of an SSI claim was not reported.) The average processing time for an ALJ hearing in FY 2000 was 274 days from the date of a hearing request, down from its peak of 386 days in 1997. Social Security Advisory Board, *Charting the Future of Social Security's*

(continued...)

approximately 255,000 individuals were awarded benefits at the ALJ level. If a claim is appealed to the Appeals Council, the wait for a final administrative decision stretches well beyond another year, though only a small number of people (under 2,500 in FY 2000) are awarded benefits by the Appeals Council.[21/]

While awaiting a decision, many applicants are destitute and live in abject poverty. The Court has recognized that Social Security disability benefits and SSI provide "the very necessities of life," and that the wrongful denial of these benefits imposes "trauma" which is "beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens." *Schweiker v. Chilicky*, 487 U.S. 412, 428-29 (1988). The Court has stated that the harm from wrongful denials of Social Security disability benefits can be "irreparable." *Bowen v. City of New York*, 476 U.S. 467, 483-484 (1986).

In the past, state general assistance programs often provided income support for individuals with chronic illnesses who did not receive federal disability benefits. Recently, many states have either abolished general welfare programs for adults unable to work or placed severe restrictions on how long a person may receive aid.[22/] Even in states that have maintained general assistance, the amounts of benefits are quite low.

Applicants with disabling impairments necessarily are uncertain about whether they will receive benefits. Although

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[20/](...continued)
Disability Programs: The Need for Fundamental Change 7 (2001), http://www.ssab.gov/reports.html; *Disability Decision Making, supra*, at 80-81, 86.

[21/] In FY 2000, the average processing time for an Appeals Council decision was 505 days from the request for review. *Id.* In some cases, benefits are not received promptly after a favorable decision is issued.

[22/] Weber, *supra*, at 939.

66% of people who appeal to the ALJ level are awarded benefits at that stage,[23/] individuals cannot know whether they will be successful in their pursuit of benefits.

Moreover, many individuals do not apply for disability benefits for a considerable period of time after they have stopped working. Some may be unaware of the programs, while others may spend down their assets prior to applying. Still others hold off applying for benefits because they are hoping for medical improvement.[24/] Therefore, by the time many apply for benefits, their financial situations may be quite dire.

Needing some income to survive, applicants may try to return to work while awaiting disability benefits, even though they may endure extreme pain or further aggravate their disabilities.[25/] Disabled applicants should not be denied

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[23/] *Disability Decision Making, supra*, at 70; *Charting the Future, supra*, at 3-4.

[24/] Thus, for example, in the five cases in which the circuit courts have agreed that an individual is eligible for a trial work period before the expiration of 12 months without SGA, each applicant had waited between four and eight months after ceasing work to apply for disability benefits. Mr. Walton was terminated from his employment as an in-school suspension teacher on October 31, 1994, and he applied for benefits on April 12, 1995. In *Salamalekis v. Comm'r of Soc. Sec.*, 221 F.3d 828 (6th Cir. 2000), the claimant stopped working on approximately April 24, 1991 and applied for benefits on October 1, 1991. In *Newton v. Chater*, 92 F.3d 688 (8th Cir. 1996), the claimant applied on April 22, 1993, alleging an onset date of October 30, 1992. In *Walker v. Sec'y Health and Human Servs.*, 943 F.2d 1257 (10th Cir. 1991), Mr. Walker applied for benefits on October 2, 1987, alleging disability since February 1987. In *McDonald v. Bowen*, 818 F.2d 559 (7th Cir. 1986), Ms. McDonald stopped working on October 25, 1982 and applied for benefits on February 28, 1983.

[25/] *See, e.g., Walker v. Sec'y Health and Human Servs.*, 943 F.2d at 1258 (applicant returned to work "out of economic necessity"); *McDonald v.*
(continued...)

disability benefits when they have waited months for favorable decisions and attempt to work because they have no other means of survival.

IV. THE COMMISSIONER'S POSITION IS CONTRARY TO THE SOCIAL SECURITY ACT'S DISABILITY AND TRIAL WORK PERIOD PROVISIONS AND THE "UNSUCCESSFUL WORK ATTEMPT" REGULATIONS

The Social Security Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A) (2001). The Commissioner determines whether individuals are disabled by applying a five step sequential evaluation process that asks the following questions: (1) Is the individual engaging in substantial gainful activity ("SGA")?[26] (2) Does the individual have a severe impairment? (3) Does the individual have an impairment that meets or equals (i.e., is equivalent to) an impairment described in SSA's Listing of Impairments? (4) Can the individual, despite any functional limitations imposed by a severe impairment, perform work that he or she did in the past? (5) Can the individual do any other type of work?[27]

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[25](...continued)
Bowen, 818 F.2d at 560 (applicant returned to work "because she needed the income" and as a result suffered back pain).

[26] Beginning January 2002, earnings at or above $780 per month will be considered SGA for persons with disabilities other than blindness. 66 Fed. Reg. 54047 (Oct. 25, 2001). For blind individuals, the level is higher. *See* 20 C.F.R. § 404.1574(b) (2001).

[27] *Disability Decision Making, supra*, at 95-98. This five step process applies to adult applicants. 20 C.F.R. § 416.924 (2001).

The Commissioner concedes that "[a]s a matter of grammar, the court of appeals [for the Fourth Circuit] is correct that the phrase 'which has lasted or can be expected to last' in Section 423(d)(1)(A) modifies the word 'impairment.'" (Petitioner's Brief at 30.) Further, the Commissioner acknowledges that the statute contains no explicit requirement that the inability to engage in SGA must last 12 months. (*Id.*)

The Commissioner contends that because the Act does not contain a duration requirement for the inability to engage in SGA, the agency is free to interpret the statute to require a duration requirement of 12 months. She argues that this interpretation is consistent with the requirement in the Act that the impairment be severe. (Petitioner's Brief at 30-32.) She suggests that without the 12 month duration requirement for the inability to engage in SGA, benefits would have to be paid for short term disabilities that do not meet the severity requirements of the Act. (*Id.* at 40.)

The essential fallacy of the Commissioner's position is that it ignores the fact that an individual may have an impairment *of disabling severity* for the statutorily mandated 12 months, yet attempt to return to work within 12 months. There is no dispute that if the impairment is (or is expected to be) of *less than* disabling level severity for 12 months, then the applicant cannot qualify for benefits.

The Commissioner's position punishes the individual with an impairment of disabling severity which continues at that level of severity for at least 12 months, but who nevertheless attempts to return to work. The Social Security Act makes clear that the individual is encouraged to "test the waters" without fear that by doing so he or she will be denied basic income maintenance. In discussing trial work periods in the government's brief to the Court in *Cleveland v. Policy Mgmt. Sys.*, 526 U.S. 795 (1999), the Solicitor General (and the General Counsel for the Social Security Administration) proclaimed, "Congress recognized that persons who legitimately apply for and receive Social Security benefits may nevertheless be or become able to work." (Brief for the United

States at 15, *Cleveland v. Policy Mgmt. Sys.* 526 U.S. 795, No. 97-1008 (1999)).

Here, the Commissioner argues, contrary to the unanimous view of five circuit courts of appeal,[28] that such a trial work period can only commence not, as stated in the statute "with the month in which (the claimant) becomes entitled to disability insurance benefits," but rather after the claimant has ceased working for twelve months and thus been entitled to SSDI benefits for seven months. The additional seven months of waiting is not set forth in the statutory provision creating trial work periods. *See* 42 U.S.C. § 422(c)(3) (2001).

Since there is no dispute that the plain meaning of the statute is clear, *i.e.* the 12 month durational requirement applies to the impairment and not to work activity, it is improper for the Commissioner to interpret the statute in a manner inconsistent with the plain meaning of the statute. The durational requirement in the definition of disability "is sensibly read 'narrowly'" and may not be expanded by the Commissioner in a manner inconsistent with the Congressional goals underlying trial work periods.[29] *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 (1995)(*quoting Commissioner v. Clark*, 489 U.S. 726, 739 (1989)).

The Commissioner concedes in a footnote that under her "unsuccessful work attempt" regulations, if the claimant's work attempt lasts 6 months or less, then it will not prevent the

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[28] In addition to the holding by the Fourth Circuit in the instant case, this is the unanimous judgment of all circuits that have addressed the issue, listed *supra* at n.24. The Commissioner acquiesced in all of these other decisions. 65 Fed. Reg. 42774 (July 11, 2000); 65 Fed. Reg. 69116 (Nov. 15, 2000).

[29] For a discussion of the rehabilitative goals of the work incentives in the Social Security Act, *see infra* at Section V.

claimant from being entitled to disability benefits.[30] (Petitioner's Brief at 27, n.8.) Frequently, an individual, despite disabling impairments, attempts to return to work within 12 months, earns at a rate of pay which would constitute SGA for a month or more, but is unsuccessful in maintaining that employment. Under the Commissioner's theory of this case, such a person would not be eligible for either SSDI or SSI if the case came up for adjudication during the brief work attempt; the claimant would automatically be denied at step one of the sequential analysis of disability.

An example will illustrate the inherent difficulty with the Commissioner's position. Assume that an individual has diabetes with progressive neuropathy in both lower extremities, seriously impairing her ability to stand and walk, despite compliance with prescribed diet and medication. In January 2000, she stopped work, due to her medical condition, and filed "concurrent" claims for SSDI and SSI benefits. Her applications for benefits were denied initially and on reconsideration. She promptly appealed each denial of her benefits. She was off work January through November 2000. However, she went back to work in December 2000 and earned $1,000 in that month. She was still working and earning at the same rate in early January 2001 when the case came up for a determination of disability at an ALJ hearing. Under the Commissioner's position, she *must* be adjudicated not disabled because she earned at a level of SGA within 12 months of onset even if the ALJ would find that her condition meets a Listing.[31] The Commissioner posits that, although she clearly has had an

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[30] More specifically, the Commissioner's regulations provide that work of three months or less will be deemed an "unsuccessful work attempt" ("UWA") if it ended or was reduced below the level of SGA because of an impairment or the removal of special accommodations. If the work lasted between three and six months, it may be an UWA if any one of a number of factors was present, such as excessive absenteeism because of the impairment. 20 C.F.R. §§ 404.1574(c), 404.1575(d), 416.974(c), 416.975(d) (2001).

[31] 20 C.F.R. pt. 404, subpt. P, app. 1 at § 9.08A (2001).

impairment of disabling severity for the requisite 12 months, she was not out of work for the requisite 12 months, and hence she is entitled to nothing. Presumably, if she stops working in the future, she must start the 12 month clock running again to become eligible for benefits. This is the essence of the Commissioner's position.

However, the Commissioner acknowledges, as she must, that this work might ultimately constitute an "unsuccessful work attempt." (Petitioner's Brief at 27, n.8.) Not surprisingly, persons with disabling impairments who attempt to return to work often fail within a relatively short period of time. Even though they may earn enough money in a month that it would constitute SGA, such SGA is not counted if the work was so short that it constituted an "unsuccessful work attempt." 20 C.F.R. §§ 404.1574(c), 404.1575(d), 416.974(c), 416.975(d) (2001). In that event, the work will be disregarded and will not interrupt a period of disability. Under the rules, a work attempt of three months or less will be deemed unsuccessful if the person was compelled to stop because of her disability, and a work attempt between three and six months may also be deemed unsuccessful.[32]

Significantly, to be eligible for an unsuccessful work attempt, the disabled person must have had "a significant break in the continuity of [his or her] work before [SSA] will consider that [the person] began a work attempt that later proved unsuccessful." 20 C.F.R. §§ 404.1574(c)(2), 404.1575(d)(2), 416.974(c)(2), 416.975(d)(2) (2001). However, the Commissioner's regulations do not require that the "significant break" be for 12 continuous months. Instead, the regulations only require that the disabled individual have discontinued work for at least 30 consecutive days. *Id.*

Thus, if the disabled claimant in the above hypothetical example were forced by her impairments to stop work in January 2001, even if she made over the SGA minimum that month, her work attempt would have been "unsuccessful" and

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[32] *See* n.30, *supra*.

the SGA in Dec. 2000 and Jan. 2001 would be disregarded. If her case had come up for adjudication in February 2001, rather than January 2001, the Commissioner concedes that she would have to be found disabled although she *did* return to work in less than 12 months.

The only way to avoid the capriciousness of this result is to follow the literal statutory definition of disability which the Commissioner concedes grammatically requires the disabling impairment (rather than the period of not working) to last or be expected to last 12 months. The Court of Appeals for the Fourth Circuit correctly decided in this case that the statute provides benefits for applicants with severe disabilities of 12 months' duration. *See City of Edmonds v. Oxford House Inc,* 514 U.S. at 732.

V. THE COMMISSIONER'S INTERPRETATION OF THE SOCIAL SECURITY ACT IS INCONSISTENT WITH THE REHABILITATIVE GOAL OF THE ACT AND RELATED LEGISLATION TO PROVIDE INCENTIVES FOR INDIVIDUALS WITH DISABILITIES TO WORK

Congress has repeatedly recognized not only that persons with disabling impairments can and do work, but that they should be encouraged to do so and should not be penalized. Without attempting to be exhaustive, this federal policy is demonstrated in a number of statutes including various provisions in the Social Security Act.[33] For example, in the Economic Opportunities for Disabled Americans Act, Pub. L. 99-643, Congress amended the Social Security Act to provide various incentives for persons who receive disability benefits to attempt to work.

Congress revisited this issue in 1999 in the Ticket to Work and Work Incentives Improvement Act, Pub. L. 106-170. The goal of the legislation was to "help individuals with disabilities go to work," by removing some of the work disincentives in the

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[33] For additional citations, *see* Respondent's Brief, §§ I(B) and II(B).

SSDI and SSI programs, S. Rep. No. 106-37, at 2 (1999), and creating new work incentives as well. The law provides extended Medicare and Medicaid benefits for persons receiving SSDI and SSI respectively who attempt to rejoin the workforce, in order to provide individuals with disabilities "with meaningful opportunities to work." H. R. Conf. Rep. No. 106-478, at 1 (1999).

In passing this legislation, Congress was critical of SSA's implementation of the provisions of the Act that were designed to encourage individuals with disabilities to return to work:

> Policymakers and advocates for the disabled have long argued that SSA's work incentives are complex, difficult to understand, and poorly implemented. They contend that some of the reasons for the high rate of unemployment among disabled beneficiaries include confusing rules, arcane procedures, and disincentives built into the Social Security and SSI programs. They note surveys that show that most people with disabilities who are of working age want to work, and maintain that the numerous Federal regulations and program rules have the perverse effect of discouraging otherwise qualified and eager job seekers with disabilities from seeking employment.

H. R. Rep. No. 106-220, at 5 (1999). Congress stated that among the "obstacles" faced by individuals with disabilities who attempt to work are the "protracted application process" and the fear of losing benefits "if their work attempts were unsuccessful." H. R. Rep. No. 106-393, at 38 (1999).

The Commissioner argues that the applicant's ability to engage in SGA is "evidence" that the individual is not disabled. (Petitioner's Brief at 49.) However, this is not necessarily true. As noted *supra* at 13-14, work activity which constitutes either a trial work period or an unsuccessful work attempt is not evidence of nondisability. Similarly, this attitude was exactly what Congress disapproved of in the Ticket to Work legislation. Congress mandated that for individuals using a "Ticket to Work," "no work activity engaged in by the

individual may be used as evidence that the individual is no longer disabled." H. R. Conf. Rep. No. 106-478, at 23 (1999).

In finding that the purpose of the Americans with Disabilities Act of 1990, Pub. L. 101-336, of encouraging persons with disabilities to work, is not inconsistent with those same persons being able to obtain SSDI or SSI, the Court unanimously recognized that:

> Further, the SSA sometimes grants SSDI benefits to individuals who not only can work, but are working. For example, to facilitate a disabled person's reentry into the workforce, the SSA authorizes a 9-month trial-work period during which SSDI recipients may receive full benefits. See 42 U.S.C. §§ 422(c), 423(e)(1); 20 CFR § 404.1592 (1998).

Cleveland v. Policy Mgmt. Sys., 526 U.S. at 805. The Court should reject the Commissioner's position in the instant matter, because it is contrary to the will of Congress as repeatedly expressed in the Social Security Act and other related legislation.

CONCLUSION

For the reasons stated, *amici* urge the Court to affirm the decision below.

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Respectfully Submitted,

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APPENDIX

INTERESTS OF *AMICI CURIAE*

AARP is a nonprofit membership organization of over 35 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. Over 2.8 million people between the ages of fifty and sixty-five receive Social Security Disability Insurance benefits. Approximately 1.25 million older Americans receive Supplemental Security Income as disabled individuals. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for individuals of all ages. AARP has filed numerous briefs before this Court in cases involving people with disabilities, including *Sims v. Apfel,* 530 U.S. 103 (2000) and *Cleveland v. Policy Management Systems Corp*, 526 U.S. 795 (1999).

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a non-profit corporation. While most NOSSCR members are attorneys in private practice, others work in programs which provide free legal services to the poor. NOSSCR members regularly represent people claiming benefits (usually, but not always, disability benefits) in administrative proceedings before the Social Security Administrative (SSA). NOSSCR members also file actions in federal court against the Commissioner of SSA (currently JoAnne B. Barnhart), appealing the final administrative denial of clients' claims for such benefits. These disability benefits have been provided by the Congress through two separate but interrelated programs: Social Security Disability Insurance benefits (SSDI) under Title II of the Social Security Act and Supplemental Security Income (SSI) under Title XVI of the Social Security Act. This case will have profound implications for our clients who attempt to return to work within 12 months despite having impairments of disabling severity.

The National Senior Citizens Law Center (NSCLC) is a non-profit organization which advocates nationwide to promote the independence and well-being of low income elderly individuals, as well as persons with disabilities, with a

particular emphasis on women and racial and ethnic minorities. Since its founding in 1972, NSCLC has recognized disability benefits provided under the SSDI and SSI programs as essential to the welfare of the low income elderly individuals who are the primary focus of NSCLC's efforts. In particular, NSCLC has long advocated and litigated in support of individuals who attempt to return to work, but fear the loss of disability benefits which will be essential to survival if the work attempt fails.

The American Association of People with Disabilities (AAPD) is a national membership organization working for economic and political empowerment of children and adults with disabilities. AAPD seeks to promote policies and practices that advance the goals of the Americans with Disabilities Act: full participation, independent living, economic self-sufficiency, and equality of opportunity.

The American Council of the Blind (ACB) is a national nonprofit, consumer organization of the blind, with seventy affiliates and members in all fifty states. ACB's mission is to improve the quality of life, equality of opportunity, and independence for all persons who are blind. To that end, ACB seeks to educate policy makers about the needs and capabilities of people who are blind, and to assist individuals and organizations wishing to advocate for programs and policies that meet the needs of people who are blind, or visually impaired. SSDI and SSI currently assist many people in this country who are blind or visually impaired.

The American Occupational Therapy Association (AOTA) is the national professional association of over 40,000 occupational therapists and occupational therapy assistants as well as students of the profession. The AOTA mission is to support the contributions of occupational therapy to health, well-being, productivity and quality of life. Occupational therapists provide treatment and intervention for people with physical and mental disabilities to promote full participation in society and maximum achievement of human potential. Occupational therapy can assist individuals with disabilities in identifying work limitations and potential. AOTA advocates on behalf of the profession and the public through support of

positive public policy such as that contained in the Americans with Disabilities Act and disability income support programs.

The Arc of the United States (The Arc), through its nearly 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and related developmental disabilities, and their families. Since its inception, The Arc has participated actively in the formulation of public policy with respect to the rights of, and services, supports, and benefits for, people with mental retardation and related developmental disabilities. The Arc has participated as *amicus curiae* in numerous cases before this Court that involve the rights of people with disabilities.

The Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Center has engaged in litigation, administrative advocacy, and public education to promote opportunities for individuals with mental disabilities to achieve independence and self-determination.

Founded in 1980, the Brain Injury Association of America is the nation's only nonprofit working for people with brain injury and their families. With more than 40 Chartered State Affiliates, hundreds of local chapters and support groups across the nation, the Association's mission is to create a better future through brain injury prevention, research, education and advocacy.

The Disability Law Center is the authorized Protection and Advocacy agency for the Commonwealth of Massachusetts. The Disability Benefits Project Support Unit, housed at the Law Center, provides technical support and training to public and private advocates representing Social Security claimants. Since 1985, work issues of concern to Social Security claimants and recipients have been a priority. Most direct representation provided by Project staff involves return to work issues.

The Epilepsy Foundation® is the sole national, charitable voluntary health organization dedicated to advancing the

interests of the more than two million people with epilepsy and seizure disorders. Epilepsy is a chronic brain disorder characterized by recurring seizures. Despite advances in medical knowledge and technology, many people with epilepsy are unable to engage in gainful employment or participate in many routine daily activities, and therefore incur significant medical costs as a result of having epilepsy. For these people, access to Social Security benefits is crucial to their very survival. The Foundation has, from its inception, advocated in the legislature and in the courts to ensure that this access is protected.

Headquartered in Sands Point, NY, the Helen Keller National Center for Deaf-Blind Youths and Adults (HKNC) provides short term comprehensive vocational rehabilitation training and assistance to students for job and residential placements. Services in the field include 10 regional offices, some 43 affiliated agencies, a National Training Team, Older Adult Program, the National Technical Assistance Consortium for Children and Young Adults Who Are Deaf-Blind Project, and D-B LINK. HKNC's role is to ensure that people who are deaf-blind receive the skills training and supports necessary to enable them to live and work in the community of their choice.

The National Association of Developmental Disabilities Councils (NADDC) is a national, non-profit organization representing State Councils on Developmental Disabilities that work for change on behalf of people with developmental disabilities and their families. It promotes national policy to enhance the quality of life for all people with developmental disabilities, enabling them to exercise self-determination and be independent, productive, integrated and included in all facets of community life. For many people with developmental disabilities, access to SSDI and SSI is critical for meeting their basic needs. NADDC is committed to ensuring proper access to these benefits.

The National Multiple Sclerosis Society is dedicated to ending the devastating effects of multiple sclerosis. The National MS Society is the only national voluntary MS organization that meets the standards of all major agencies that

rate nonprofit groups. The Society supports more MS research and serves more people with MS than any national voluntary MS organization in the world. Through its 50-state network of chapters, the Society funds research, furthers education, advocates for people with disabilities, and provides a variety of empowering programs for the third of a million Americans who have MS and their families.

The Title II Community AIDS National Network (TIICANN) is a national nonprofit organization, which represents the interests of those disabled and other HIV-positive persons served by state AIDS Drug Assistance and other programs funded under Title II of the Ryan White Act. TIICANN provides advocacy, training, and policy/legislative support for better drug and other health care access and strengthened disability benefits protections for disabled and other HIV-positive Americans.

United Cerebral Palsy Associations (UCP) represents over 100 affiliates in 43 states. The mission of UCP is to advance the independence, productivity and full citizenship of people with cerebral palsy and other disabilities.